

1                   BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
2                   STATE OF WASHINGTON

3 KAUFMAN BROTHERS CONSTRUCTION, )  
4 INC., )

5                   Appellant, )

6                   v. )

7 OLYMPIC AIR POLLUTION CONTROL )  
8 AUTHORITY, )

9                   Respondent. )  
10 \_\_\_\_\_ )

PCHE Nos. 89-98 & 89-132

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

11           THIS MATTER involves the appeals of Olympic Air Pollution Control  
12 Authority's civil penalty assessments, (\$50 and \$200) for alleged  
13 fugitive dust in violation of Section 9.05(d)(3) of Regulation I. The  
14 Pollution Control Hearings Board ("PCHB") held a hearing on November  
15 1, 1989, in Lacey, Washington. Board members present were Judith A.  
16 Bendor, Presiding, and Harold S. Zimmerman.

17           Vic J. Kaufman, co-owner with his brother Marvin Kaufman,  
18 represented appellant Kaufman Brothers Construction, Inc.  
("Kaufman"). Attorney Fred D. Gentry of Bean, Gentry and Rathbone,

1 represented Olympic Air Pollution Control Authority ("OAPCA"). The  
2 proceedings were reported by Bibi Carter of Gene Barker and  
3 Associates.

4 Witnesses were sworn and testified. Exhibits were admitted and  
5 examined. Argument was made. From the testimony heard, exhibits  
6 examined and contentions, the Board makes the following:

7 FINDINGS OF FACT

8 I

9 Vic J. and Marvin Kaufman own Kaufman Brothers Construction, Inc.,  
10 which is a general contracting business in Thurston County,  
11 Washington.

12 The Kaufmans are developing property for commercial use. The 13  
13 acre site is located along Stable Court, east of old Highway 99 and  
14 north of Trail's End, in or near Tumwater, Washington.

15 II

16 Olympic Air Pollution Control Authority ("OAPCA") is a municipal  
17 corporation with authority to conduct a program of air pollution  
18 prevention and control in an area which includes the Kaufmans' site.

19 The PCHB recognizes and takes notice of OAPCA's Regulation 1,  
20 Article 9.

21 III

22 On June 5, 1989, an air inspector for OAPCA responded to  
23 complaints from residents living adjacent to the Kaufmans' property  
24 along Stable Court. The inspector visited the site at about 5:00 p.m.  
25

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(2)

1 and saw dust blowing from the Kaufmans' land to the west to the  
2 residences on Stable Court. The Kaufmans had recently stripped the  
3 site of sod in preparation for development.

4 On June 5, the few water sprinklers on site were largely being  
5 used to cure some concrete slabs. There were effectively no dust  
6 control measures in operation at that time. The severity of the dust,  
7 which was a fine, sandy material, had forced one resident to go inside  
8 and shut his door. A second resident operates a daycare center in  
9 Stable court. The dust led to the curtailing of the childrens'  
10 playing outside. Dust also settled on this resident's car.

11 The inspector spoke with Vic Kaufman the next day about the  
12 violation.

13 IV

14 On June 6, 1989, the inspector received two more complaints. On  
15 June 8, 1989, a Notice of Violation for failure to control dust was  
16 sent by certified mail to Vic Kaufman of Kaufman Brothers. It was  
17 received June 9, 1989.

18 A Notice of Civil Penalty Assessment (\$50) was sent on July 24,  
19 1989, alleging violation of Section 9.05(d)(3) of Regulation I. The  
20 Kaufmans filed their appeal with this Board on August 2, 1989, which  
21 became PCHB No. 89-98.

22 V

23 By July 7, 1989, the Kaufmans had added some sprinklers and three  
24  
25

1 "soaker" hoses to control the dust. Each soaker hose was 50 feet long  
2 and the three hoses together could water about 1/10 acre at a time.

3 VI

4 On July 7, 1989, OAPCA control officer visited the site in  
5 response to a complaint. He saw dust blowing from the Kaufmans'  
6 property off-site.

7 VII

8 A Notice of Civil Penalty Assessment for the July 7, 1989 event  
9 was sent to appellant. The Notice alleged violation of Section  
10 9.05(d)(3) of Regulation and assessed a \$200 penalty. Kaufmans filed  
11 their appeal on October 9, 1989, which became our PCHB No. 89-98.

12 VIII

13 After the July 7, 1989 incident, the Kaufmans graveled part of  
14 the area in late August or early September, black-topped part of the  
15 area in about mid-September, and seeded some of the area about a month  
16 before the November 1 hearing.

17 The Kaufmans have been sparing in their use of water to quell the  
18 dust. They use a private water company and the water supply is  
19 limited. The Kaufmans have at times seen children playing on site,  
20 knocking over sprinklers and shutting off water.

21 IX

22 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
23 adopted as such.

24 From these Findings of Fact the Board enters the following  
25

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CONCLUSIONS OF LAW AND ORDER  
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1 CONCLUSIONS OF LAW

2 I

3 The Board has jurisdiction over the parties and the subject  
4 matter. Chpts. 43.21B and 70.94 RCW.

5 II

6 OAPCA Regulation I at Section 9.05(d)(3) states in pertinent part:

7 (d) Fugitive particulate material. Reasonable and/or  
8 appropriate precautions shall be taken to prevent  
9 fugitive particulate material from becoming airborne  
[ . . . ]  
(3) from an untreated open area.

10 For the purpose of this subsection, fugitive  
11 particulate means particulate material which is generated  
12 incidental to an operation, process or procedure and is  
13 emitted into the open air from points other than an  
opening designed for emissions such as stack or vent.

14 III

15 We conclude that the fine dust and particles that blew from the  
16 Kaufman industrial site to the Stable Court residences on June 5, 1989  
17 and July 17, 1989 were "fugitive particulate material" which became  
18 "airborne from an untreated open area."

19 The Kaufman brothers are in the general construction business.  
20 They should have known that when sod is stripped from land, the  
21 exposed soil is vulnerable to wind and could become airborne unless  
22 reasonable or appropriate measures are taken. There were no  
23 effective, appropriate or reasonable dust control measures in  
24 operation on June 5, 1989. Moreover, after being informed about the  
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1 June violation, the subsequent dust control measures taken before  
2 July 7, 1989, were very limited, and neither reasonable nor  
3 appropriate. The Kaufmans had a responsibility to take measures so  
4 that dust did not leave the site, while knowing their water supply  
5 situation and potential mischief by children. They failed to do so,  
6 thereby impacting the neighbors. Efforts after the July incident were  
7 not even undertaken until about 6 weeks later.

#### 8 IV

9 The principal aim of civil penalties is to deter violations and  
10 to secure compliance. The statutory maximum for each violation is  
11 \$1,000. Under the facts of this case, we conclude that the penalty  
12 assessments were appropriate and should be affirmed. The Kaufmans'  
13 efforts were insufficient, limited, and often not undertaken until  
14 after a violation had occurred.

#### 15 V

16 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
17 adopted as such.

18 From these Conclusions of Law, the Board enters this  
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(6)

ORDER

The violations of section 9.05(d)(3) of Regulation I are AFFIRMED  
and the penalties in the sum of \$50 and \$200 are AFFIRMED.

DONE this 9th day of December, 1989.

POLLUTION CONTROL HEARINGS BOARD

  
JUDITH A. BENDOR, Presiding

  
HAROLD S. ZIMMERMAN, Member

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